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23 and OTTOMOTTO LLC

24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA
26 SAN FRANCISCO DIVISION

27 WAYMO LLC,
28 Plaintiff,
v.
29 UBER TECHNOLOGIES, INC.,
30 OTTOMOTTO LLC; OTTO TRUCKING LLC,
31 Defendants.

32 Case No. 3:17-cv-00939-WHA

33 **DEFENDANTS UBER
34 TECHNOLOGIES, INC. AND
35 OTTOMOTTO LLC'S SUR-REPLY
36 IN OPPOSITION TO WAYMO'S
37 MOTION TO COMPEL
38 PRODUCTION OF DUE DILIGENCE
39 REPORT**

40 Date: May 25, 2017
41 Time: 10:00 a.m.
42 Ctrm: F, 15th Floor
43 Judge: Hon. Jacqueline Scott Corley

44 Trial Date: October 2, 2017

1 Waymo primarily uses its reply brief (Dkt. 445) to set forth an unsupported narrative of
 2 wrongdoing in an effort to persuade this Court that the Due Diligence Report (the “Report”) and
 3 accompanying exhibits¹ are not protected by three fundamental legal doctrines: the attorney-client
 4 privilege, the work product doctrine, and the common interest doctrine. Waymo does not,
 5 however, base its arguments on these legal principles or associated case law, nor does Waymo
 6 dispute many of Defendants’ legal arguments or evidence. Unsupported rhetoric, like that offered
 7 by Waymo, cannot unravel foundational legal privileges particularly where, as here, the case law
 8 amply supports preserving them. Apparently accepting that Defendants have the better of the
 9 legal arguments already made, Waymo inappropriately advances two new arguments in its reply.
 10 Defendants appreciate leave granted by the Court to address those two arguments.²

11 A. **The Way in Which This Litigation has Unfolded is Irrelevant to an Assessment of the**
 12 **Existence of a Common Legal Interest, Which Must be Analyzed at the Time the**
 13 **Communications are Made.**

14 Waymo contends that Defendants and Messrs. Levandowski and Ron lack a common
 15 legal interest in light of “the way in which the litigation against Waymo has actually unfolded....”
 16 (Dkt. 445 at 6.) This argument fundamentally misunderstands key principles of the common
 17 interest doctrine.

18 First, it is well established that the assessment of the existence of a common legal interest
 19 is made *at the time* the privileged information is communicated. Waymo argues that the parties’
 20 *current* adversity on some issues, which developed *after* sharing the privileged information,
 21 destroys the common interest protections afforded to privileged information shared previously
 22 (and pursuant to a common legal interest). This is not the law. *See Neilson v. Union Bank of*
 23 *Cal., N.A.*, 2003 WL 27374179, at *4 (C.D. Cal. Dec. 23, 2003) (“[T]he common interest rule is
 24 concerned with the relationship between the transferor and the transferee *at the time that the*
 25 *confidential information is disclosed*. The fact that the parties’ interests have diverged over the

26 ¹ For the avoidance of any doubt, the Report and exhibits are the only documents rightfully before
 27 this Court on this motion. *See* Apr. 25, 2017 Order (Dkt. 271) at 1 ¶ 2 (“[P]laintiff shall move, if
 28 it wishes to do so at all, to compel production of the due diligence report that was the subject of
 Levandowski’s motion.”).

29 ² This sur-reply is limited to the issues raised in Defendants’ request for this brief. (Dkt. 460.)
 Failure to address any other issue is not a waiver as to that issue.

1 course of the litigation does not necessarily negate the applicability of the common interest rule.”) (citing *In re United Mine Workers of Am. Employee Ben. Plans Litig.*, 159 F.R.D. 307, 314 (D.D.C. 1994); *Ellis v. J.P. Morgan Chase & Co.*, 2014 WL 1510884, at *7 (N.D. Cal. Apr. 1, 2014) (court evaluates whether, “**at the time** of the communications at issue,” parties “continued to share a common interest”) (citations, internal quotation marks omitted); *Microban Sys., Inc. v. Skagit Nw. Holdings, Inc.*, 2016 WL 7839220, at *1 (W.D. Wash. Aug. 17, 2016) (“**At the time of the communications**, the interests of both Microban and Barr were aligned in attempt to determine the value of Microban’s intellectual property, and to determine whether litigation would be required to secure the full value of those rights.”) (emphases added).

10 Second, it is axiomatic that parties to a common interest agreement can share a common
 11 legal interest in one or more respects and nonetheless be adverse in other respects. The common
 12 interest doctrine “does not require a complete unity of interests among the participants, and it may
 13 apply where the parties’ interests are adverse in substantial respects.” *United States v. Bergonzi*,
 14 216 F.R.D. 487, 495 (N.D. Cal. 2003); *see also United States v. Gonzalez*, 669 F.3d 974, 980 (9th
 15 Cir. 2012) (“[P]arties to an asserted JDA need not have identical interests and may even have
 16 some adverse motives.”). Thus, even assuming that an adversity of interests between Uber and
 17 Mr. Levandowski existed at any time prior to Mr. Levandowski’s assertion of the Fifth
 18 Amendment, like when the Report was circulated in August 2016 as Waymo suggests (Dkt. No.
 19 445 at 7), that would not—and did not—prevent the joint defense parties from entering into a
 20 joint defense agreement months prior for the common legal interest of gathering and
 21 understanding facts related to the risk of joint litigation with Google following Uber’s proposed
 22 acquisition of Ottomotto and Otto Trucking LLC. (Tate Decl. (Dkt. 370) ¶¶ 7, 9, 12; Suhr Decl.
 23 (Dkt. 378) ¶ 6; Bentley Decl. (Dkt. 376) ¶¶ 8, 11; Baker Decl. (Dkt. 375) ¶¶ 5-6; Gardner Decl.
 24 (Dkt. 381) ¶¶ 3-4; *see also* Ex. 2 (Dkt. 370-2) at 1; Ex. 3 (Dkt. 370-3) at 2 (confirming parties’
 25 common legal interest).) The court in *Matter of Grand Jury Subpoena Duces Tecum Dated Nov.*
 26 *16, 1974*, 406 F. Supp. 381, 392 (S.D.N.Y. 1975), cited in *Bergonzi*, 216 F.R.D. at 495, explained
 27 this well: parties to a joint defense agreement are “entitled to risk” their potential adversity “for
 28 the sake of strengthening [their] immediate defense That a joint defense may be made by

1 somewhat unsteady bedfellows does not in itself negate the existence or viability of a joint
 2 defense.” *See also The Pampered Chef. v. Alexanian*, 2010 WL 7809455 (N.D. Ill. Aug. 18,
 3 2010) (“The potential for adversity on certain issues ***in the future*** is not inconsistent with a
 4 present and continued common interest with respect to other ‘legal goal[s].’”) (emphasis added).

5 **B. Newly-Alleged Predicate Crimes Do Not Compel Application of the Crime-Fraud**
Exception.

6 After failing to establish the applicability of the crime-fraud exception based on alleged
 7 trade secret theft—because, as Defendants showed in opposition, it did not even try to meet its
 8 evidentiary burden of proving every element of the alleged ongoing crime (Dkt. 369 at 17)—
 9 Waymo now includes fleeting references to two more predicate crimes they propose to justify the
 10 application of the crime-fraud exception: obstruction of justice and receipt of stolen property, in
 11 violation of California Penal Code § 496. (Dkt. 445 at 10; n.7.) Again, Waymo makes no
 12 attempt to satisfy its burden of presenting evidence that would establish the elements of such
 13 alleged predicate crimes—and, incredibly, Waymo again does not even argue that obstruction of
 14 justice or receipt of stolen property *are* the predicate crimes; it just says that each *would or could*
 15 *be* predicate crimes and hopes the Court finds such unsupported argument sufficient. To reiterate:
 16 Waymo is required to “present evidence which, if believed by the jury would establish the
 17 elements of the alleged crime or fraud.” *Laser Indus. Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417,
 18 436 (N.D. Cal. 1996) (citing *United States v. Laurins*, 857 F.2d 529, 541 (9th Cir. 1988)). This is
 19 an exacting showing that Waymo’s own briefing makes clear cannot be satisfied. *See Laser*
 20 *Indus.*, 167 F.R.D. at 441-42 (requiring proponent of crime-fraud exception to present evidence
 21 establishing every element of common law fraud by a preponderance of the evidence; discussing
 22 all requirements for application of exception in civil case); *In re Napster Inc. Copyright Litig.*,
 23 479 F.3d 1078, 1096-98 (9th Cir. 2007) (same, citing *Laser Indus.* with approval).³

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 25 ³ Even had it tried, Waymo would fail in presenting evidence showing obstruction of justice. *See, e.g., United States v. Ruhbayan*, 201 F. Supp. 2d 682, 686 (E.D. Va. 2002) (evidence that, in letters the defendant wrote, he explained to the recipient how to lie to defendant’s attorney and directed the recipient to give false testimony satisfied evidentiary burden; crime-fraud exception applied); *Laurins*, 857 F.2d 529, 541 (cited but not discussed by Waymo) (defendant lied to attorney about location of documents; evidentiary burden satisfied; crime-fraud exception applied); *United States v. Reeder*, 170 F.3d 93, 106 (1st Cir. 1999) (criminal defendant’s

1 Waymo instead attempts to cast Defendants' compliance with Judge Alsup's March 16
 2 Order as evidence of an ongoing crime. The Order required Defendants to produce "documents
 3 downloaded . . . and taken" by Messrs. Levandowski, Kshirsagar, and Raduta as well as *any*
 4 documents "that have forwarded, used, or referred to any part of said downloaded material."
 5 (Dkt. 61 ¶ 4.) Defendants' extensive efforts to comply with this (rightfully) broad Order are the
 6 exact opposite of obstruction of justice and are not evidence of an ongoing crime or concealment
 7 of a crime. (Dkt. 445 at 10.) The Court's *in camera* review will confirm this to be the case.
 8 Additionally, the joint defense parties' reasons for engaging the services of attorneys—to
 9 understand joint litigation risks arising from Uber's potential acquisition of Ottomotto and Otto
 10 Trucking—would defeat any cognizable evidence to the contrary. (Tate Decl. (Dkt. 370) ¶¶ 7, 9,
 11 12; Suhr Decl. (Dkt. 378) ¶ 6; Bentley Decl. (Dkt. 376) ¶¶ 8, 11; Baker Decl. (Dkt. 375) ¶¶ 5-6;
 12 Gardner Decl. (Dkt. 381) ¶¶ 3-4; *see also* Ex. 2 (Dkt. 370-2) at 1; Ex. 3 (Dkt. 370-3) at 2
 13 (confirming parties' common legal interest)); *cf. Laser Indus.*, 167 F.R.D. at 438 (where evidence
 14 and argument of ongoing crime in "equipoise," crime-fraud exception does not apply).

15 As part of the "bad acts" narrative it pushes, Waymo is essentially asking the Court to cast
 16 Defendants' lawful invocation of fundamental legal privileges as evidence of an ongoing crime,
 17 or put differently, to hold that Defendants' assertion of privilege is in and of itself a criminal act.
 18 As Defendants' extensive cited authorities show, this is not the law. The Court should not allow
 19 Waymo to distort such fundamental legal privileges for its own ends.

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24 conversation with attorney in which he asked for help "to cover up his criminal conduct"
 25 admissible under crime-fraud exception). Likewise, Waymo would have failed in its burden to
 26 prove trade secret theft had it tried. *Cf. In re Heraeus Kulzer GmbH*, No. 3:09-CV-530 RM, 2012
 27 WL 1493883, at *6 (N.D. Ind. Apr. 26, 2012) ("The evidence upon which Heraeus relies doesn't
 28 rise to the level of a *prima facie* showing or support an inference that Biomet employees sought
 legal advice and conspired with counsel to further a scheme to use Heraeus' trade secrets. Even if
 the court were to find Heraeus' conclusion plausible—that Biomet employees sought legal advice
 about how to successfully use Heraeus' trade secrets without detection—Biomet's alternative
 explanation is equally plausible—that Biomet employees sought legal advice relating to the
 company's new relationship with Esschem and how to properly conduct that business.").

1 Dated: May 19, 2017

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3 By: /s/ Karen L. Dunn

4 Karen L. Dunn

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6 UBER TECHNOLOGIES, INC. and
OTTOMOTTO LLC

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